UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD: REGION 1

FARERI ASSOCIATES, LP, GREENWICH PARK, LLC, GREENWICH PREMIER SERVICES CORP., AND BRENWOOD HOSPITALITY, LLC A SINGLE EMPLOYER[1]	**Case Nos.:**
AND	**01-CA-188158, 01-CA-190046, 01-CA-191779, 01-CA-214016**
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ	**MOTION TO BIFURCATE PROCEEDINGS**

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION FOR BIFURCATION

PRELIMINARY STATEMENT

Fareri Associates, LP ("Fareri"), Greenwich Park LLC ("GP"), Greenwich Premier Services Corp. ("GPS"), and Brenwood Hospitality, LLC ("Brenwood"), (collectively, "Respondents"), by and through their attorneys, Milman Labuda Law Group PLLC, pursuant to section 102.35(a)(8) of the regulations for the National Labor Relations Board ("NLRB" or the "Board"), 29 C.F.R. § 102.35(a)(8), move for an Order of Bifurcation, severing the underlying unfair labor practice allegations from the allegations that Fareri, GP, GPS, and Brenwood constitute a single employer.

The requested bifurcation is proper because the litigation involved in establishing single employer status is extremely intense; whereas the litigation involved in determining whether the alleged unfair labor practice occurred is relatively simple.

Litigating single employer status requires copious document production and testimony from a myriad of individuals—not only those involved with any alleged unfair labor practice but also those involved with the administration of both entities, including financial associates,

[1] The Employer objects to this caption, as it contains a legal conclusion, and denies that that the Respondents are a single employer.

accountants, owners, comptrollers, and representative samples of employees, for each employee classification, of every single entity named as a Respondent to establish that Respondents have (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership.

This intense, costly, lengthy, and burdensome litigation is unnecessary if there is no unfair labor practice—the determination of which is fairly straight-forward. Consequently, the issue of single employer should be bifurcated from the underlying alleged unfair labor practice, with the unfair labor practice issue litigated before litigation regarding the single employer issue, if such litigation is necessary.

LEGAL STANDARD

Bifurcation

An Administrative Law Judge ("ALJ") may bifurcate issues raised in a Complaint. 29 C.F.R. § 102.35(a)(8); UPMC Presbyterian Hosp., 2018 NLRB LEXIS 29, *7-8 (Jan. 18, 2018). The factors to consider when determining bifurcation include: (1) whether an issue is ancillary from the underlying unfair labor practice allegations, (2) whether an issue would extend the litigation, perhaps unnecessarily so, (3) whether the same witnesses would be testifying on all issues, and (4) any other considerations to expediate and economize the litigation. UPMC Presbyterian, 2018 LEXIS 29, 7-9; NLRB Bench Book, §3-430.

The Board has specifically held that "one such area where bifurcation/severance is appropriate is on issues of single or joint employer status" because single employer litigation often extends trial by weeks on matters relating more to "a matter involving refinement of remedy rather than the basic question presented . . . whether unfair labor practices were perpetrated and, if so,

remedied at least by normal procedure." UPMC Presbyterian, 2018 LEXIS 29, 9 (citing Beverly Health and Rehabilitation Services, Inc., 335 NLRB 635, 653 n. 4 (2001)).

Single Employer

In general, under the doctrine of limited liability in corporate law, separate, related corporate entities may escape the liabilities of the other. Ferrara v. Oakfield Leasing, Inc., 904 F. Supp. 2d 249, 260 (E.D.N.Y. 2012). The single employer doctrine is an exception to that general rule. Id. Only in particularly exceptional instances will the employees of one entity be treated as employees of a separate, yet related, entity. Id.

To be regarded as a single employer, courts must conclude that the entities at issue operate as a single integrated enterprise. Radio & Television Broad. Technicians Local Union v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256-57 (1965); Ferrara v. Oakfield Leasing, Inc., 904 F. Supp. 2d 249, 260 (E.D.N.Y. 2012). The controlling criteria for such a determination are as follows: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership. Oaktree Capital Mgmt., 2006 NLRB LEXIS 197, *12-13 (N.L.R.B. May 24, 2006); Sakrete of Northern California, Inc. 137 N.L.R.B. 1220, 1222(N.L.R.B. January 1, 1962). This determination involves examining processes for payroll, filing insurance claims, conducting sales, preparing tax returns, procuring licenses, and computer operation work, among other operational elements. See Herman v. Blockbuster Entertainment Group, 18 F. Supp. 2d 304, 309, 311 (S.D.N.Y. 1998) (examining factors relevant to single employer analysis); EEOC v. Grace Episcopal Church of Whitestone Inc., 2007 U.S. Dist. LEXIS 98559 at *6-8 (July 3, 2007 E.D.N.Y.) (same).

In addition, for "two nominally distinct enterprises [to be] joint and severally liable under the collective bargaining agreement ("CBA") signed by only one," the two entities must also "represent an appropriate bargaining unit." Ferrara, 904 F. Supp. 2d at 260-61.

Unfair Labor Practice

To establish an unfair labor practice, the General Counsel's office of the NLRB (the "General Counsel") must demonstrate either that the employees' rights under section 7 of the National Labor Relations Act ("NLRA" or the "Act") were interfered with, restrained, or adversely effected by coercion from the employer, that the employer discriminated against the employees based on union affiliation, or that the employer unlawfully discouraged membership in any union organization. NLRA, section 8(a)(1), 8(a)(3), 29 U.S.C. §§ 158(a)(1), 158(a)(3). In sum, the General Counsel must establish that an employer's decision was motivated by anti-union animus. NLRB v. Galicks, Inc., 671 F.3d 602, 608 (6th Cir. 2012) (citing Wright Line, 251 N.L.R.B. 1083 (1980)).

Specifically, the General Counsel must establish a *prima facie* case that anti-union animus contributed to an employer's decision to lay off employees, to refuse to hire them, or to implement some other adverse employment action against employees. See NLRB v. Galicks, Inc., 671 F.3d at 608 (citing W.F. Bolin Co. v. NLRB, 70 F.3d 863, 870 (6th Cir. 1995) and Transp. Mgmt. Corp., 462 U.S. at 398-403). Once the General Counsel establishes a *prima facie* case of anti-union animus, the burden shifts to the employer to prove "by a preponderance of the evidence that it would have taken the same action even in the absence of protected conduct." Id. (citing Fivecap, Inc. v. NLRB, 294 F.3d 768, 778 (6th Cir. 2002) and NLRB v. Gen. Sec. Servs. Corp., 162 F.3d 437, 442 (6th Cir. 1998)).

ARGUMENT

As previously stated, the factors to consider when determining bifurcation include: (1) whether an issue is ancillary from the underlying unfair labor practice allegations, (2) whether an issue would extend the litigation, perhaps unnecessarily so, (3) whether the same witnesses would be testifying on all issues, and (4) any other considerations to expediate and economize the litigation. UPMC Presbyterian, 2018 LEXIS 29, 7-9; NLRB Bench Book, §3-430.

As exhibited in the previous section, the scope of litigation associated with establishing single employer is much broader than that of establishing an unlawful labor practice, especially in the context of this case, which involves a small number of employees laid off due, allegedly, to anti-union animus and even a smaller number of managers that were allegedly involved in the decision to implement said lay-offs.

Here, the General Counsel alleges in the Complaint that Raul Hernandez and Julio Roldan, both allegedly agents of Respondents as defined in section 2(13) of the NLRA, violated the rights of several employees, who were previously employed by United Services of America/Affineco ("Affineco"), an SEIU Local 32BJ shop, by either refusing to hire them or firing them based on their past union affiliation. See Complaint ¶¶ 9-16. Respondents deny all such allegations. Any adverse employment action implemented by Respondents was motivated by legitimate, non-discriminatory factors, specifically that any such decision was based on complaints from tenants of Greenwich Office Park ("GOP").

This entire case, then, depends on whether the decision to refrain from hiring former Affineco employees or the decision to fire former Affineco employees was based on anti-union animus or on the concerns of the GOP tenants.

Even the allegation that Respondent violated its duty to bargain with SEIU, Local 32BJ posed by the General Counsel in paragraphs 17-24 of the Complaint hinges on a finding that Raul Hernandez and Julio Roldan engaged in an unfair labor practice.

Every paragraph in the Complaint deals with this issue of anti-union animus, save for one, which alleges that Respondents are a single employer in conclusory terms—paragraph three (3) of the Compliant.

In contrast, the General Counsel's subpoenas in this matter each consist of forty-five (45) requests[2] for the production of documents, many of which are extremely broad and burdensome, and which predominately, if not exclusively, relate to whether Respondents are a single employer. They ask, of all four (4) entities, for tax returns, lease agreements, deeds, entire balance sheets, all contracts, all invoices, all local, state or federal government licenses, insurance policies, all advertisings, all promotions, and public offering statements, financial statements, minutes of directors' meetings——the list goes on, and on—none of which has anything to do with whether anti-union animus existed in this case. See e.g. Subpoena Requests 1-16.

Moreover, these requests regarding single employer are the most burdensome and onerous because they request information going back until January 1, 2013. Even if the requests are modified so that Respondents do not have to produce records from 2013, producing records for 2014, 2015, 2016, 2017 and for the first 7 months of 2018 remains an outrageously onerous and burdensome request. The alleged unfair labor practice occurred in November 2016. Yet, to establish single employer, the General Counsel insists it needs over four (4) years' worth of documents.

[2] The Subpoena has two (2) requested numbered "8." Thus, although the last request is numbered 44, it is, in reality, the 45th request.

Also, to prove single employer status between Respondents, a whole other set of witnesses would be necessary, such as the accountants for each entity, the controllers, the human resource managers, the managers at each entity, the employees at all four entities, insurance brokers, payroll company representatives, sales representatives from all companies, marketing plans, and a whole other set of documents would have to be reviewed.

As it stands now, all of the above-referenced witnesses and documents would have to be disclosed to General Counsel on July 31, 2018.

The need to have all of the single employer witnesses and single employer documents present at the trial starting on July 31, 2018, however, would be completely obviated if the ALJ finds no unfair labor practice.

In this case, the single employer analysis will most likely be obviated because there is ample evidence that GPS's decision to not hire former Affineco personnel or to fire them was motivated by tenant complaints, poor performance, and/or other economic considerations. Thus, there is a significant probability that there will be no unfair labor practice in this case, making the single employer analysis unnecessary, frivolous, and an unnecessary, onerous production burden on Respondents.

Accordingly, based on the above-described facts of this case and the above-described factors to consider in assessing the appropriateness of bifurcation, this case should be bifurcated because the single employer issue is separate from the underlying unfair labor practice issue, the single employer matter involves different witnesses, different documents than the unfair labor practice matter, and would significantly lengthen the trial—perhaps unnecessarily so, if there is a finding of no unfair labor practice, of which there is a high probability in this case. Moreover, the restrictive budgetary measures implemented by Congress with regard to National Labor Relations

Board should be considered in determining whether the NLRB's resources should be allocated to a lengthy trial involving single employer status, when that issue may very well be unnecessary.

NLRB law corroborates this conclusion that bifurcation is appropriate in this case. Where the single employer litigation would excessively lengthen the trial and where the issues of unfair labor practices and single employer are easily compartmentalized, as is the case here, then Board law holds that the issue of unfair labor practice and single employer should be bifurcated and severed into separate trials. UPMC Presbyterian Hosp., 2018 NLRB LEXIS 29, *7-8 (Jan. 18, 2018); see also Beverly Health and Rehabilitation Services, Inc., 335 NLRB 635, 653 n. 4 (2001).

Any argument that the single employer analysis is integral to whether an unfair labor practice occurred is meritless. In this case, to prove an unfair labor practice, the first step is to determine who made the decision to fire or not hire former Affineco employees. The final step is to determine why that person or persons made that decision. Regardless of whether the decider was a Fareri GP, GPS, or Brenwood employee, the motivation behind the decision is all that matters for determining liability for an unfair labor practice.

If, and only if, the ALJ finds that the decision to implement the adverse employment actions in the Complaint was motivated by anti-union animus, and liability for back pay is established, only then would the single employer inquiry be appropriate. Single employer is a theory about ascribing the liabilities of one entity to another. Ferrara v. Oakfield Leasing, Inc., 904 F. Supp. 2d 249, 260 (E.D.N.Y. 2012). The General Counsel has to first prove that GPS committed an unfair labor practice and is liable for back-pay. The single employer inquiry is only relevant once such underlying liability is established. Therefore, the single employer analysis is not integral to the underlying liability, but only ancillary to issue of whether Affineco's employees were subjected to an unfair labor practice.

Accordingly, the ALJ should bifurcate this case.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Administrative Law Judge bifurcate these proceedings and sever the issue of unfair labor practices from single employer status.

Dated: July 17, 2018
Lake Success, NY

Respectfully submitted,

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